

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,) MM Docket No. 00-245
FM Broadcast Stations.) RM-9971
(Alberta and Dinwiddie, Virginia, and Whitakers) RM-10185
and Garysburg, North Carolina) RM-10186

MEMORANDUM OPINION AND ORDER

Adopted: January 5, 2005

Released: January 10, 2005

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration filed by Dinwiddie Radio Company ("Dinwiddie Radio") and a Petition for Reconsideration and Clarification filed by MainQuad Broadcasting, Inc. ("MainQuad") both directed to the *Report and Order* in this proceeding.¹ Garysburg Radio filed a Consolidated Opposition to Petition for Reconsideration. For the reasons discussed below, we deny both Petitions for Reconsideration.

Background

2. At the request of MainQuad, licensee of Station WSMY-FM, Channel 276A, Alberta, Virginia, the *Notice of Proposed Rule Making* proposed the substitution of Channel 276C3 for Channel 276A at Alberta, reallocation of Channel 276C3 from Alberta to Whitakers, North Carolina, and modification of the Station WSMY-FM license specify operation on Channel 276C3 at Whitakers. This proposal was pursuant to Section 1.420(i) of the Commission's Rules which permits the modification of a station authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.² Under *Community of License* a reallocation proposal must result in a preferential arrangement of allotments using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.³ In this situation, the reallocation would result in Whitakers (with a 2000 U.S. Census population of 799 persons) receiving its first local service. In order to replace the loss of the sole local service at Alberta, the *Notice* also proposed the allotment of Channel 299A to Alberta.

¹ *Alberta, Virginia, and Whitakers, North Carolina; Dinwiddie, Virginia, and Garysburg, North Carolina*, 17 FCC Rcd 8781 (MB 2002).

² *See Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License")*, 4 FCC Rcd 4870 (1989), *recon. granted in part* 5 FCC Rcd 7094 (1990).

³ 90 FCC 2d 88 (1988). The FM allotment priorities are: (1) First fulltime aural service.; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

3. In response to the *Notice*, we received two Counterproposals. Garysburg Radio proposed the allotment of Channel 276A to Garysburg, North Carolina, as a first local service. In order to accommodate this allotment, Garysburg Radio also proposed the substitution of Channel 299A for Channel 276A at Alberta, and modification of the Station WSMY-FM license to specify operation on Channel 299A.⁴ The second Counterproposal was filed by Dinwiddie Radio proposing the allotment of Channel 299A to Dinwiddie, Virginia, as a first local service. According to the 2000 U.S. Census, the population of Garysburg is 1,254 persons, while the 2000 Rand-McNally Commercial Atlas and Marketing Guide lists the population of the unincorporated community of Dinwiddie at 200 persons. The *Report and Order* allotted Channel 276A to Garysburg and modified the Station WSMY-FM license to specify operation on Channel 299A. That action was premised on the fact that the Garysburg Radio proposal would provide a first local service to the largest of the three communities.⁵

4. In support of its Petition for Reconsideration, Dinwiddie Radio argues that we “may” have underestimated the population of Dinwiddie and that we failed to afford the Dinwiddie Radio proposal “additional weight” because it would provide Dinwiddie County with its first radio service. We reject both of these arguments. Dinwiddie Radio has not set forth any identifiable boundaries to support its contention that Dinwiddie contains 751 persons instead of the 200 persons listed in the Rand-McNally Commercial Atlas and Marketing Guide. In any event, even at the 751 persons suggested by Dinwiddie Radio, the Garysburg proposal would be preferred over the Dinwiddie proposal. In regard to the second argument, we note that both Dinwiddie and Dinwiddie County receive in excess of five aural services.⁶ For this reason, the fact that the Dinwiddie Radio proposal would be the first radio service licensed in Dinwiddie County does not warrant revisiting the *Report and Order*.

5. In support of its Petition for Reconsideration and Clarification, MainQuad contends that the population difference between Whitakers (799 persons) and Garysburg (1,254 persons) is *de minimis* and should not be the basis to compare these competing proposals for a first local service because its proposal would provide additional service to approximately 127,000 more persons than the Garysburg Radio proposal.⁷ As such, MainQuad contends that our decision was “devoid of a rational basis.” We disagree.

⁴ To this end, we issued an *Order to Show Cause* directed to MainQuad to show cause why its license should not be modified to specify operation on Channel 299A in lieu of Channel 276A. *Alberta and Dinwiddie, Virginia, and Whitakers and Garysburg, North Carolina*, 16 FCC Rcd 22579 (MMB 2001).

⁵ See *Blanchard, Louisiana, and Stephens, Arkansas*, 10 FCC Rcd 9828 (1995); *Rose Hill, Trenton, Aurora and Ocracoke, North Carolina*, 11 FCC Rcd 21223 (MMB 1996), *aff'd* 15 FCC Rcd 10739 (MMB 2000), *rev. denied* 16 FCC Rcd 15610 (2001); see also *West Liberty and Richwood, Ohio*, 6 FCC Rcd 6068 (MMB 1991); *Three Oaks and Bridgman, Michigan*, 5 FCC Rcd 1004 (MMB 1990); *Clarksville and Lanesville, Indiana*, 4 FCC Rcd 4968 (MMB 1989).

⁶ The Commission has considered five or more reception services to be “abundant.” *Family Broadcasting Group*, 53 RR 2d 662 (Rev. Bd. 1983), *rev. denied* FCC 83-559 (Comm’n Nov. 29, 1983); see also *LaGrange and Rollingwood, Texas*, 10 FCC Rcd 3337 (1995).

⁷ In its Petition for Reconsideration and Clarification, MainQuad notes that on February 8, 2002, its affiliate, MainQuad Communications, filed a Petition for Rule Making proposing the reallocation of Channel 272A from Roanoke Rapids, North Carolina, to Garysburg, North Carolina, and modification of the Station WPTM license to specify Garysburg as the community of license. According to MainQuad, this would negate a first local service preference for the Garysburg Radio proposal. We disagree. The MainQuad Petition for Rule Making was filed after the comment date in this proceeding and would not be considered in our resolution of this proceeding. In any (continued....)

Because we are comparing two first local services under Priority 3, our decision is governed by the populations that would receive a first local service as opposed to an additional receptive service.⁸ In this instance, our decision is also buttressed by the fact the additional population that would receive service from the MainQuad proposal already receives service from five or more stations. Where the number of reception services is above this threshold level, we see no basis to depart from Commission policy to use a population comparison of the two communities seeking a first local service.⁹ Finally, we note that by preferring the Garysburg proposal over the Whitakers proposal, we are not only providing the larger community with a first local service but, in this instance, retaining an FM station in Alberta, resulting in a net gain of an FM allotment in the Table.

6. Contrary to the MainQuad argument, our decision preferring the Garysburg proposal because it is 455 persons larger than Whitakers is consistent with the Commission decisions in *Blanchard, Louisiana, and Stephens, Arkansas, and Seabrook, Huntsville, Bryan, Victoria, Kennedy and George West, Texas*.¹⁰ In *Blanchard*, the Commission affirmed a staff action preferring a first local service at Blanchard over a competing first local service at Stephens based on a thirty-eight person population differential. Even though Blanchard receives a significantly greater number of reception services, this was not taken into consideration because both service areas would receive at least five reception services. In *Seabrook*, the Commission determined that a second fulltime aural service to 455 persons was *de minimis* and not entitled to a preference under Priority 2. Unlike this proceeding and *Blanchard*, *Seabrook* did not involve a comparison between proposals invoking a co-equal FM Priorities 2 or 3. Instead, the Commission determined that a rulemaking proposal should not receive an otherwise dispositive Priority 2 preference on the basis of a *de minimis* number of persons and that all of the competing rulemaking proposals should be considered under Priority 4. This is also consistent with prior decisions in which we did not afford a rulemaking proposal a preference as a first local service under Priority 3 when the community's population consisted of a *de minimis* number of persons.¹¹

7. The *Report and Order* modified the Station WSMY-FM to specify operation on Channel 299A in order to accommodate the Channel 276A at Garysburg. In its Petition for Reconsideration and Clarification, MainQuad requests that we clearly state that the ultimate permittee of the Channel 276A allotment at Garysburg will be required to reimburse it for the costs of changing the channel of Station WSMY-FM. In accordance with *Circleville, Ohio*, the ultimate permittee of the Channel 276A allotment at Garysburg is, in fact, required to reimburse the licensee of Station WSMY-FM for the reasonable and prudent costs of changing its channel in order to accommodate this allotment.¹²

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event, the MainQuad Communications proposal was dismissed on December 8, 2003. *Roanoke Rapids and Garysburg, North Carolina*, 18 FCC Rcd 25633 (MB 2003).

⁸ See *Cumberland, Kentucky, and Weber City, Glade Spring, Marion, Richards and Grundy, Virginia*, 17 FCC Rcd 5024 (MMB 2002).

⁹ See *Blanchard, Louisiana, and Stephens, Arkansas*, *supra*.

¹⁰ *Seabrook, Huntsville, Bryan, Victoria, Kennedy and George West, Texas*, 10 FCC Rcd 9360 (1995).

¹¹ See e.g. *Debra D. Carrigan*, 58 RR 2d 96 (Rev. Bd. 1885); *Santee Cooper Broadcasting Co.*, 57 RR 2d 662 (Rev. Bd. 1984); *Ruarch Associates*, 57 RR 2d 1593 (Rev. Bd. 1984).

¹² See *Circleville, Ohio*, 46 RR 2d 1295 (1967).

8. This document is not subject to the Congressional Review Act. The Commission is, therefore, not required to submit a copy of this *Memorandum Opinion and Order* to GAO, pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)A), because the petition for reconsideration was denied.

9. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Dinwiddie Radio Company IS DENIED.

10. IT FURTHER ORDERED, That the aforementioned Petition for Reconsideration and Clarification IS GRANTED to the extent indicated above and IS DENIED in all other respects.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Robert Hayne, Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

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